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Can Witnesses in Civil Cases Lie Under Oath With Impunity When Asked About Sex?

As recently as this past spring it was not uncommon to hear some talking head say that nobody was ever prosecuted for committing perjury in a civil case. That view has now been obliterated by the facts.

Today, we are more likely to hear a talking head acknowledge that, yes, there are prosecutions for testifying falsely in a civil case but that such prosecutions are rare, complicated, nuanced, and that no prosecutor would prosecute someone for lying about consensual sexual activity. This view, too, will fall by the wayside as the case of Dr. Barbara Battalino and other cases become more widely known.

The Case of Dr. Battalino: Dr. Battalino was a psychiatrist in the Veterans Hospital in Boise, Idaho. She was sued by one of her patients, and in the course of that lawsuit she swore falsely about her sexual relationship with the patient. The United States Department of Justice prosecuted her for obstructing justice by lying under oath.

Battalino pled guilty and was sentenced in July to one year of probation (six months of it in house detention) and a \$3,500 fine. To this day, she wears an electronic bracelet to monitor her whereabouts. If she had gone to trial and been convicted, the sentencing guidelines would have provided for a sentence of 10 months in jail. The statute itself (18 U.S.C. §1503) provides for imprisonment for up to 10 years, a fine of up to \$250,000 (see, 18 U.S.C. §3571), or both. With penalties like these, it is perfectly clear that Congress regards obstruction of justice as a serious felony and not a trifling infraction.

Thanks to the efforts of *The Weekly Standard*, the *Washington Times*, and others (the *New York Post* headlined its story, "Doc Paid Stiff Price for Lying Like Bill"), the Battalino case is becoming more widely known. It is the best recent case showing that the U.S. Justice Department regards false swearing as a serious matter — even when the falsehood was sworn to in a civil case and even when the falsehood was about consensual sexual activity.

There are evident similarities between the Battalino case and the President's current problems. There are differences, too. In an August 3 editorial *The Weekly Standard* said:

"Barbara Battalino . . . has behaved more honorably than Bill Clinton. She had an affair. She lied about it in court at first. But then she fessed up and agreed to pay the price of her dishonesty. She has behaved more honorably — and yet she has suffered the worse. And among the many reasons why is the fact that Battalino has faced a Justice Department determined to administer the law impartially. Clinton, alarmingly, has not."

The Battalino case is not the only relevant case, of course, and another interesting case has recently appeared in the press.

The Case of Lloyd Davis: In 1988, Lloyd R. Davis filed a libel suit against a Waukegan, Illinois newspaper and the reporter who wrote a story about Davis's (homosexual) sexual activity. During a deposition in that civil case, Davis was asked about his past sexual conduct and he denied all of the relevant allegations. Shortly thereafter, the newspaper's insurance company paid Davis \$50,000 and the lawsuit was settled. Later, however, in light of additional information, Davis was indicted for perjury. In January 1995, the Illinois Supreme Court cleared the way for Davis to be prosecuted on the perjury charge.

In the lower State courts, Davis had argued successfully that his answers could not constitute perjury because they were not *material* because the trial judge did not know about the answers and could not have relied upon them in any of his pretrial rulings. The State Supreme Court construed the State's perjury law to require only that a sworn statement "be material to the issue or point in question;" the statement need not actually "be before the trier of fact or anyone else." In a concurring opinion, two justices wrote:

"The oath is a crucial legal tool to insure that deponents and witnesses tell the truth. However, Davis' position . . . devalue[s] the significance of the oath and fundamentally undermine[s] the entire truth-seeking process of our justice system. As this court has recognized, 'the law attaches superior effect to statements made under oath, and the [perjury] statute is designed to insure that all such statements merit the trustworthiness which the law assigns to them.' 'Our whole judicial system rests upon the assumption that sworn witnesses tell the truth.' 'A person who wilfully lies under oath should not escape punishment' simply because the false statement is never actually submitted to a trier of fact." *Illinois v. Davis*, 647 N.E.2d 977, 982 (Ill. 1995) (McMorrow, J., concurring) (citations omitted).

There is more to learn about the relationship between lying under oath in a civil case and being prosecuted for perjury. However, what we have learned so far does not support the idea that lying under oath (just so long as the lie is about sex) is like telling a little white lie. To the contrary, it's more like committing a felony.

Staff Contact: Lincoln Oliphant, 224-2946
RPC Intern Bryan W. Blades assisted in the preparation of this paper.

The Battalino case has been featured in David Tell's editorials, "Contagious Corruption," and "Bill Clinton: This Precedent's For You," in *The Weekly Standard* of Aug. 3, 1998 (p. 9) and June 22, 1998 (p. 9). The *Washington Times* has run several pieces on the Battalino case; it seems to have first appeared in the *Boise Weekly*. On the Davis case, see Harvey Berkman, "Minister's Perjury Tale is Warning for Clinton," *The National Law Journal*, Aug. 24, 1998, p A1.